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In The

Supreme Court of the United States

October Term, 1996

ONE WORLD ONE FAMILY NOW, a Hawaii non-profit corporation; JAMES McDONOUGH, an individual; BHAKTIVEDANTA MISSION, LTD., a Hawaii non-profit corporation; and ANTON VOIGHT, an individual,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU; FRANK F. FASI, individually and in his capacity as Mayor of the City and County of Honolulu; MICHAEL NAKAMURA, Chief of Police; DONNA WOO, individually and in her capacity as Special Deputy Attorney General of the State of Hawaii; and John Does 1-10,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Free Speech Clause of the First Amendment allows a city to enforce a content-neutral ban on peddling on the public streets and sidewalks of a small, historic, aesthetically significant and heavily congested urban district.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents the City and County of Honolulu, et al. ("the City"), respectfully urge the Court to deny the writ of certiorari sought by petitioners in this case. The decision of the Court of Appeals for the Ninth Circuit in this case upheld the application of the City's general peddling ordinance to petitioners' high-volume sales of T-shirts on the streets and sidewalks of the Waikiki Special District of Honolulu. *One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009 (9th Cir. 1996), reprinted at Pet. App. 1-24. Petitioners claim that their sales implicated the First Amendment because their T-shirts contained some words such as "Take It Easy Meditate Hang Loose Hawaii" alongside "colorful depictions of Hawaii's scenic natural beauty, not unlike shirts sold in retail stores catering to tourists." Pet. App. 3. The district court and the court of appeals below, bound by Ninth Circuit precedent, assumed that such sales do implicate the First Amendment,[1] but held nonetheless that the City's application of the peddling ordinance to such sales amply satisfied this Court's well-settled standards governing content-neutral regulations of the time, place and manner of speech. Pet. App. 6-12. Because that decision is sound and because there are no contrary decisions in any other

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[1] In the proceedings below, the City argued that petitioners' T-shirt sales amounted to conduct, not speech, and thus that the application of a general peddling ordinance to such activity should not trigger any First Amendment scrutiny at all, as in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), and like precedents. The City does not abandon that argument here, but there is no need to reach it in order to deny the petition.

circuit, this case does not present an issue warranting this Court's review.

The City's peddling ordinance was enacted in 1957 and has been amended several times since. Revised Ordinances of Honolulu § 29-6.2 (b) (7), reprinted at Pet. 2-3. It permits peddling in public areas throughout Honolulu except for nine specified areas, which were selected because they have special scenic beauty or historical importance, or because they present special problems of pedestrian movement and safety. The Waikiki Special District meets all three criteria: it is an area of great natural beauty and historical importance and, because it is a major visitor destination, its sidewalks are highly congested. See Pet. App. 28-30 (findings of the district court).

As defined in the applicable statutes, the Waikiki Special District covers an area of approximately 507 acres, or about 0.7 square mile, and encompasses about 0.125% of the County of Honolulu, which covers the entire 625 square miles or 400,000 acres of the island of Oahu. The Waikiki Special District was established in 1976 to ensure that Waikiki – which the district court described as "the center of Hawaiian culture and social gatherings for Hawaiians for hundreds of years," Pet. App. 29 – would maintain an ambiance evoking Hawaiian culture, romance, and the Aloha spirit. The ordinance establishing the Special District restricts hotel and apartment sizes and locations within the District, reduces height limitations in certain areas, requires landscaped open space, and promotes a pedestrian-oriented environment. As part of the effort to protect and preserve Waikiki, the sidewalks along Kalakaua Avenue were widened in the late 1980s at substantial public expense to provide a broad

thoroughfare for heavy pedestrian traffic by residents and as many as 60,000 visitors a day. See Pet. App. 29. Trees and outdoor furniture were installed along this route, and bicycles, skateboards, in-line skates, and other wheeled vehicles were banned from the sidewalks.

Petitioners are two of the several groups that began selling T-shirts in 1992 from "display tables on the sidewalks of Kalakaua Avenue, one of the busiest commercial streets in Waikiki." Pet. App. 3. Petitioners conspicuously omit from the Appendix to the Petition for Certiorari four photographic exhibits that the court of appeals expressly reprinted from the record and included in its opinion below. See Pet App. 16. Those photographs, which the City hereby supplies below at App. 1-4, belie petitioners' description of themselves as itinerant street proselytizers who merely sold a few T-shirts on the side. See Pet. 3. To the contrary, those photographs depict large heaps of T-shirts stacked several feet high, covering the entire surface of vending tables where no obvious literature is displayed, no obvious sign identifies the sellers or their cause, and the only information provided pertains to quantity and price, such as "$5 each or 5 for $20." See App. 1. As the district court found, petitioners supplied literature about their causes only "when asked." Pet. App. 27, 28.

Based on a record that included extensive evidence submitted by the City at a two-day preliminary injunction hearing, the district court found that the peddling ordinance furthered "three significant interests": (1) "maintaining the aesthetic attractiveness of Waikiki," (2) "promoting public safety and the orderly movement of

pedestrians," and (3) "protecting the local merchant economy." Pet. App. 48; see Pet. App. 7. The court of appeals, in an opinion authored by Judge Kozinski and joined by Judge Hawkins over Judge Pregerson's dissent, agreed that these interests were "substantial," Pet. App. 8-9, and that the city had demonstrated that they were its "actual" interests, Pet. App. 10. The court of appeals also found that "[n]one of these interests concerns the content of speech," and thus that the peddling ordinance is entirely content-neutral. Pet. App. 7.

Finally, the court of appeals held that "the peddling ordinance is narrowly tailored to serve these interests" under the standard set forth by this Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Pet. App. 10. As the court of appeals noted, "Without the ordinance, sidewalk vendors (commercial and charitable alike) would be free to peddle their wares on Kalakaua and Kuhio Avenues, undermining the city's efforts to provide a pleasant strolling and shopping area. . . . A proliferation of sidewalk vendors could also aggravate the congestion on already crowded sidewalks and siphon off sales from local merchants." *Id.* Accordingly, the City's interests " 'would be achieved less effectively absent the regulation.' " *Id.* (quoting *Ward*, 491 U.S. at 799). The city " 'did no more than eliminate the exact source of the evil it sought to remedy.' " Pet. App. 11 (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984)). And the city left open "ample alternative channels of communication," Pet. App. 11, leaving petitioners entirely "free to disseminate and seek financial support for their views" throughout Waikiki by "handing out literature, proselytizing or soliciting donations," by "hand[ing] out free

T-shirts to passers-by," or by "mingl[ing] with Waikiki's tourist throngs wearing T-shirts (thereby acting as human billboards)." Pet. App. 12.

On the basis of this "ample evidence" of "basic and traditional" government interests and "ample alternative channels for plaintiffs to communicate their messages," the court of appeals held it constitutional for the City to apply the peddling ordinance to petitioners' sales throughout the Waikiki Special District. Pet. App. 14-15.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW CORRECTLY APPLIED WELL-SETTLED TIME, PLACE AND MANNER LAW.

The court of appeals applied this Court's well-settled time, place and manner law in a conventional and straightforward manner to Honolulu's indisputably content-neutral peddling ordinance. Nothing in the decision below conflicts with any precedent in this Court, nor does its reasoning raise any unresolved First Amendment issue of exceptional importance. Attempting to manufacture such an issue, petitioners claim that the court below erred, first, in treating the peddling ordinance as a place or manner regulation rather than a complete ban (Pet. 10-12); second, in holding that the city's substantial interests apply throughout the Waikiki Special District (Pet. 13-15, 17-19); and third, in declining to mandate selective, content-based exemptions from the peddling ordinance as a supposedly less restrictive alternative (Pet. 15-17, 20-21). All three claims are meritless.

A. The Peddling Ordinance is a Place or Manner Regulation, Not a Complete Ban.

Contrary to petitioners' mischaracterization, the peddling ordinance is *not* "a complete ban on a medium of protected expression." Pet. 10; *see id.* at 12, 13, 21. First, the peddling ordinance is not directed at expression. Rather, it bars street sales of *all* "goods, wares, merchandise, foodstuffs, refreshments or other kinds of property or services" – from suntan oil and beach mats to transistor radios and T-shirts. Honolulu, Haw. Rev. Ordinances § 29-6.2 (b) (7), reprinted at Pet. 2. Second, it is not a complete ban. Honolulu has *not* banned peddling city-wide, but rather *permits* peddling city-wide, with the narrow exception of nine specified areas including Waikiki, an area comprising only 507 acres. Accordingly, the court below correctly reviewed the ordinance as applied to petitioners' activities as simply a regulation of the place or manner of speech.

For this reason, petitioners' reliance upon this Court's decision in *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994), see Pet. 12, 20, is wholly misplaced.[2] *Ladue* invalidated a ban on posting signs on private residential property. The ban there was aimed at expression, and was city-wide. Honolulu's peddling ordinance is neither. Peddling of all goods, not only those with words on them, is

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[2] Because the Honolulu peddling ordinance is not a complete ban on a medium of expression, petitioners' reliance on such cases as *Schneider v. State*, 308 U.S. 147 (1939) (invalidating a ban on handbilling), and *Martin v. Struthers*, 319 U.S. 141 (1943) (invalidating a ban on door-to-door solicitation), see Pet. 11, is likewise misplaced.

foreclosed on public sidewalks in Waikiki. Petitioners may peddle T-shirts freely throughout virtually all of Honolulu's public spaces simply by crossing the streets or canals that mark the boundaries of Waikiki. And they are free to sell T-shirts as much as they please on private property, including in Waikiki. See Pet. App. 12. Thus Honolulu, unlike Ladue, has not "suppress[ed] too much speech." 114 S. Ct. at 2045.

Moreover, the Court in *Ladue* characterized the posting of signs on one's own home as "a venerable means of communication that is both unique and important," *id.*, because it provides "information about the identity of the 'speaker,' " *id.* at 2046. In contrast, the court below correctly found that selling T-shirts is not similarly unique, because the sale of T-shirts on public sidewalks "does nothing to make the message uniquely significant or effective." Pet. App. 13-14. Indeed, this Court in *Ladue* expressly noted that its holding might well have been different "in the case of signs (whether political or otherwise) displayed by residents for a fee." 114 S. Ct. at 2047 n.17. Thus the court below properly concluded that, "[w]hile *wearing* a message-bearing T-shirt might be a uniquely valuable mode of communication . . . , the same can't be said for *selling* such a T-shirt on the sidewalk." Pet. App. 13.[3]

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[3] As Judge Ginsburg similarly observed in a recent case that is discussed more fully in Part II below, "T-shirts may be communicative, but their sale does not add anything to ISKCON's ability to communicate its ideas to passers-by on the Mall. Whereas a book, a tape, a newspaper, or a handbill is a convenient way of communicating more information than can be relayed on sandwich boards or by engaging a stranger in

Thus the court below correctly held that this case is governed not by any decisions involving complete medium bans, but rather by the long line of decisions upholding content-neutral place or manner regulations that simply displace a particular medium of speech from the speaker's desired location. For example, in *Heffron v. ISKCON*, 452 U.S. 640 (1981), the Court upheld a state fair regulation that barred sales, solicitation and literature distribution in all the public thoroughfares of a 125-acre state fairgrounds, confining them instead to fixed, rented booths. In *Frisby v. Schultz*, 487 U.S. 474 (1988), the Court upheld a municipal ordinance that banned from public streets and sidewalks all picketing, even on public issues, that was targeted at people's homes. In *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Court held that, under the time, place or manner test generally applicable to public forums, *see id.* at 808-10, a city could completely ban the posting of political signs on public utility poles. And in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the Court upheld a ban on camping in Lafayette Park and the Washington Mall as applied to demonstrators protesting homelessness through the symbolic conduct of sleeping overnight in those parks.

In light of these decisions, there is no basis for petitioners' assertion that "[t]his Court has never sanctioned

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conversation, the message printed on . . . a T-shirt . . . is just as well communicated by its display as by its sale." *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 961 (D.C. Cir. 1995) (D. Ginsburg, J., concurring in part and dissenting in part on other grounds).

a complete ban on a medium of protected expression in a traditional public forum as vast as that at issue here." Pet. 10-11. To the contrary, the Court routinely upholds content-neutral conduct or time, place or manner regulations that are justified by substantial government interests, regardless of how large an area is affected. In *Clark*, for example, the Court upheld the camping ban as applied to anti-homelessness demonstrators throughout park areas stretching "some two miles" through the heart of the nation's capital. 468 U.S. at 290. What matters is not the size of the area affected, but rather the relevance of the government goals to the area covered by a regulation. As this Court observed in *Frisby*, even "[a] complete ban can be narrowly tailored" so long as "each activity within the proscription's scope is an appropriately targeted evil." 487 U.S. at 485 (citing *Taxpayers for Vincent*).

By petitioners' logic, any place restriction on a medium of speech could be recharacterized as a "complete ban" on speech in some area, such as a particular sidewalk or street corner or zoning district. This logic must be rejected, for it would turn time, place and manner law on its head. Accordingly, the court below was entirely correct to "use the standard governing time, place and manner restrictions" to review the application of the peddling ordinance to petitioners' activities. Pet. App. 6.

B. The Peddling Ordinance is Narrowly Tailored to the City's Substantial Aesthetic, Safety, and Economic Interests.

A content-neutral law such as the peddling ordinance is narrowly tailored so long as it serves substantial

government interests that "would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. at 799. *See also Clark v. Community for Creative Non-Violence*, 468 U.S. at 297. This test does not require that the City employ the least restrictive alternative, but only that a regulation not be "*substantially* broader than necessary to achieve the government's interest." *Ward*, 491 U.S. at 800. The court below correctly concluded that the record below easily satisfied this test.

Petitioners do not contest the substantiality of the City's interests in avoiding visual blight or averting pedestrian traffic congestion. Nor could they, given this Court's long treatment of such government interests as significant and substantial for purposes of time, place and manner analysis.[4] As Justice Stevens wrote for the Court in *Taxpayers for Vincent*, "municipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant forms for expression," 466 U.S. at

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[4] Petitioners do contest the substantiality of the City's interest in protecting its merchant economy from unfair competition by vendors of similar products who incur no overhead or tax obligations. See Pet. 14. Any such argument is foreclosed, however, by this Court's decision in *Turner Broadcasting, Inc. v. FCC*, 114 S. Ct. 2445 (1994), which held that government interests in preserving an industry or in fostering fair economic competition are plainly substantial enough to sustain a content-neutral regulation of speech, so long as the regulation is narrowly tailored. *See id.* at 2470 ("[T]he Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment.").

806, and "visual assault on the citizens" of a city "constitutes a significant substantive evil within the City's power to prohibit," *id.* at 807. *See also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981). Likewise, the Court has long held that government may protect the "safety and convenience" of persons using a public forum, *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941), including by "maintain[ing] the orderly movement of the crowd," *Heffron*, 452 U.S. at 649-50. In particular, this Court has repeatedly acknowledged that speech activities that involve the face-to-face exchange of money, as do the sales at issue in this case, are especially likely to cause problems of pedestrian traffic congestion in crowded areas, and has repeatedly deferred to content-neutral sales and solicitation regulations aimed at controlling such problems. *See id.* at 653-54 (upholding a sales and solicitation ban at state fair); *id.* at 664-65 (Blackmun, J., concurring in part and dissenting in part); *United States v. Kokinda*, 497 U.S. 720, 733-34 (1990) (plurality opinion) (upholding a solicitation ban on post office sidewalks); *id.* at 739 (Kennedy, J., concurring in judgment under traditional time, place and manner analysis); *ISKCON v. Lee*, 505 U.S. 672, 683-84 (1992) (upholding a solicitation ban in public airport terminals); *id.* at 689-90 (O'Connor, J., concurring and concurring in judgment); *see also Henderson v. Lujan*, 964 F.2d 1179, 1185 (D.C. Cir. 1992) (noting that "free distribution of literature is far less disruptive than solicitation" of money in public forums).

Petitioners quarrel rather with the fit between the peddling ordinance and these indisputably substantial and content-neutral ends. They contend, first, that the court of appeals improperly found the City's interests to

apply to all streets of Waikiki, rather than only to the principal commercial thoroughfares of Kalakaua and Kuhio Avenues. See Pet. 17-19. The district court, perhaps attempting a Solomonic resolution of this controversy, had found that the peddling ordinance served the City's interests on the main streets but not the side streets of Waikiki. See Pet. App. 52-53. The court of appeals reversed the latter determination and found the ordinance narrowly tailored to the City's interests throughout the whole of Waikiki. Pet. App. 14-15.

Contrary to petitioners' contentions, this holding was plainly within the authority of the court of appeals, and was plainly correct on the merits. Whether or not the ordinance is adequately tailored to the City's interests under the First Amendment is a question of law or at most a mixed question of law and fact subject to de novo review by an appellate court. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338, 2344 (1995). Petitioners thus err in describing it as a "finding of fact" requiring deference to the district court. Pet. 17. Moreover, the court of appeals was correct to hold on the merits that, under this Court's precedents, "[c]ities need not prove up their interests on a block-by-block basis, particularly where the interests asserted are as basic and traditional as Honolulu's." Pet. App. 14. By redrawing the map of Waikiki along lines no party had suggested, the district court had ignored this Court's admonition in *Clark v. CCNV* that intermediate scrutiny of content-neutral regulations "do[es] not . . . assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks," nor the City as manager of its public sidewalks. 468 U.S. at 299. The

court of appeals correctly applied a far more appropriate level of scrutiny in upholding the peddling ordinance boundaries as drawn by the City.[5]

Petitioners assert, second, that the many alternative channels of expression that Honolulu has left open to them are not enough. See Pet. 20-21. They claim that "petitioners are totally excluded from the entire Waikiki area, which is the only viable place where they can reach their intended audience." Pet. 21. This claim is baseless. Petitioners are in no way excluded from Waikiki; only their sales activities are excluded. As the court below correctly found, petitioners are free to speak on Waikiki streets in " 'myriad and diverse' " ways, including "handing out literature, proselytizing or soliciting donations," as well as handing out or wearing T-shirts. Pet. App. 12. This Court has always found such alternatives sufficient in parallel cases. *See, e.g., Heffron*, 453 U.S. at 640 (noting that Hare Krishna proponents were free in the open spaces of the state fair to "mingle with the crowd and orally propagate their views"); *Frisby*, 487 U.S. at 484 (noting that picketers were free to march, proselytize and distribute literature). Moreover, petitioners are free to sell

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[5] Petitioners also suggest that the court of appeals improperly shifted the burden from the City to the speaker by noting that Honolulu's interests "can be presumed to operate throughout a city, absent a strong showing to the contrary." Pet. App. 15; see Pet. 17-18. This suggestion is misguided. Petitioners take this statement out of context. In context, it simply punctuates the court's conclusion, upon careful review of the record, that "[t]here was ample evidence . . . that the city's interests in open and attractive sidewalks and fair competition extended throughout Waikiki." Pet. App. 14 (citing record evidence).

T-shirts on virtually every public space in Honolulu outside of Waikiki. Waikiki may well be the most lucrative vending site, but petitioners have offered no reason why selling T-shirts on the streets of Waikiki is the only possible way they can disseminate their views.

To the extent that petitioners suggest that they enjoy an absolute right to reach their intended audience by way of their chosen medium, they are incorrect as a matter of law. All time, place and manner regulations deprive speakers of their intended communication with an intended audience, but all time, place and manner regulations are not therefore unconstitutional. To the contrary, as this Court has noted, "[i]t is common ground that the First Amendment does not guarantee the right to communicate one's views at all times and places in any manner that may be desired." *Heffron*, 452 U.S. at 647; *see Adderly v. Florida*, 385 U.S. 39, 48 (1966).

Accordingly, the court of appeals was correct to find the peddling ordinance narrowly tailored to the City's substantial aesthetic, public safety and economic interests under the standard set forth by this Court in *Ward*.

C. Content-Based Exemptions from the Peddling Ordinance Are Not a Less Restrictive Alternative.

Petitioners concede, as they must, that a content-neutral regulation "need not be the least restrictive or least-intrusive means" of serving governmental interests. *Ward*, 491 U.S. at 798, quoted at Pet. 15. They complain nonetheless that the court of appeals declined to order the City to adopt "a number of realistic, obvious and less-

burdensome alternatives." Pet. 15. For example, they suggest that "the City could limit sales activities to qualified nonprofit organizations," and limit the merchandise they may sell to items that are "inherently communicative," or that "contain a message of intellectual content that is inextricably intertwined with a statement carrying a religious, political, philosophical or ideological message." Pet. 16.

If there were any First Amendment problem with the peddling ordinance, that cure would surely be worse than the disease. To require the City to scrutinize T-shirt messages for their "intellectual content" would require content discrimination of a kind usually repugnant to the First Amendment. To require police officers on the beat on crowded city streets to ensure that the specially exempted vendors' merchandise was sufficiently "religious, political, philosophical or ideological" would surely be a First Amendment nightmare. Nor is it an obvious answer to say all "nonprofits" could simply sell what merchandise they wished. For in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), this Court held that a city may not allow noncommercial speech in a public forum while banning commercial speech that poses the identical harms – in that case, sidewalk clutter that was equally ugly and dangerous whether newsracks were commercial or noncommercial. Thus the nonprofit/for-profit distinction urged by petitioners might itself be deemed impermissibly content-based under *Discovery*, assuming that sidewalk sales of non-profit organizations' T-shirts saying "Take It Easy Meditate Hang Loose Hawaii" cause just as much unattractive and pedestrian-

impeding clutter as would sidewalk sales of commercial T-shirts urging readers to "Just Be," or "Just Do It."

Clearly Honolulu need not open up the public streets and sidewalks of Waikiki to all peddling, turning the district into a flea market or a street bazaar. Yet granting petitioners' proposed exemptions from the flat peddling ordinance upheld below would necessitate dangerous distinctions between expressive and non-expressive T-shirt sales. Far from being less restrictive of speech, such an approach would be more restrictive, entangling government in content determinations now wholly absent from the administration of the ordinance. In like circumstances, this Court has held that a flat ban is preferable to a regime of content-based exemptions. *See, e.g., Clark v. CCNV*, 468 U.S. at 297 (noting that distinguishing expressive from non-expressive camping "would present difficult problems for the Park Service"); *Taxpayers for Vincent*, 466 U.S. at 816.

Accordingly, the court of appeals was correct to reject petitioners' misguided suggestions of supposedly less restrictive alternatives, and to hold that "Honolulu's peddling ordinance isn't 'substantially broader than necessary' to achieve its interests." Pet. App. 11.

II. THE DECISION BELOW PRESENTS NO CIRCUIT CONFLICT.

Petitioners correctly concede that "the panel decision is not directly in conflict with other decisions of the courts of appeals." Pet. 10 n.4. They conspicuously fail to mention anywhere in their petition, however, the only other circuit court decision in a closely analogous case – a decision that is fully in accord with the decision of the

Ninth Circuit below. In *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949 (D.C. Cir. 1995), the Court of Appeals for the District of Columbia Circuit upheld against First Amendment challenge a National Park Service regulation prohibiting sales of message-bearing T-shirts, audiotapes, religious beads and other merchandise on the Washington Mall and other park lands in the national capital. *ISKCON*, like the decision below, correctly concluded that, even if sales of expressive merchandise count as speech, they are subject, like any speech, to narrowly tailored content-neutral laws.

The National Park Service regulation at issue in *ISKCON* exempted sales of books, newspapers, leaflets, pamphlets, bumper stickers, and buttons from the Service's general ban on the sale of merchandise within National Capital Region parks. *See ISKCON v. Kennedy*, 61 F.3d at 952. The effect of this regulation was to ban sales of other arguably expressive merchandise not included in the exemption, such as T-shirts, religious beads and audio tapes – even though a previous Park Service enforcement guideline had briefly permitted such expressive merchandise to be sold. *See id.* The Park Service had closed this loophole, restoring message-bearing T-shirts and like items to the default position of the general sales ban, because the parks had been subject to a massive proliferation of vending activity, especially on the Mall, and especially involving T-shirts. The Park Service deemed this T-shirt proliferation an "unsightly, inappropriate and an unwelcome commercial intrusion." *Id.* at 957 (quoting 59 Fed. Reg. 25,857).

In a challenge brought by vendors of religious beads and audio tapes, the D.C. Circuit held that "the sale of

[ISKCON's] audio tapes is protected under the First Amendment," *id.* at 954, but held nonetheless that the Park Service regulation was content-neutral and subject only to the intermediate scrutiny appropriate to review of "time, place and manner" regulations, *id.* at 956-58. Under that standard, *ISKCON* easily found the Park Service anti-vending regulations constitutional, as they served a substantial interest in reducing commercialism in the nation's capital's parks. Indeed, the D.C. Circuit appeared to assume that a flat ban on all merchandise sales in the parks to serve this interest would be clearly constitutional. The only feature of the regulation that made the case at all difficult, and that divided the majority from the dissent, was its underinclusiveness – printed matter, bumper stickers and buttons could be sold but T-shirts, audio tapes and religious beads could not. The majority concluded that this underinclusiveness was not fatal because the regulation "does not favor one side of an issue and its rationale is not undermined by its exemptions." *Id.* at 957. In the present case, of course, there is no comparable issue of underinclusiveness. The Honolulu ban is a flat ban, and petitioners do not contest the finding of the court of appeals below that narrow exceptions for newspapers and parade buttons and souvenirs are content-neutral. See Pet. App. 7-8 n.5.

Petitioners cite several district court decisions as allegedly in conflict with the decision below. Pet. at 10 n.4. These claimed conflicts are illusory.[6] Particularly

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[6] Two of the district court decisions claimed by petitioners to "conflict with" the Ninth Circuit decision below are incapable of so conflicting because they are from districts within and

misleading is petitioners' citation of *Friends of the Vietnam Veterans Memorial v. Kennedy*, 899 F. Supp. 680 (D.D.C. 1995). In *Friends*, Judge Sporkin, for the district court, purported to invalidate the very same Park Service regulation that the D.C. Circuit had upheld the previous month in *ISKCON*, the court of appeals decision unmentioned by petitioners. Not surprisingly, as petitioners fail to mention, the United States has moved for summary reversal of *Friends* on the ground that there is no meaningful First Amendment distinction between the sales of T-shirts at issue in *Friends* and of audio tapes and religious beads at issue in *ISKCON*, and thus that the district court decision defies the governing authority of *ISKCON*. *See Friends of the Vietnam Veterans Memorial v. Kennedy*, No. 95-5393, Motion for Summary Reversal filed Jan. 4, 1996 (D.C. Cir.). That motion remains pending. Except in the unlikely event that the D.C. Circuit were to affirm *Friends* and overrule *ISKCON*, there is no circuit conflict on the permissibility of applying general content-neutral sales bans to sales of message-bearing T-shirts. Rather, the Ninth and the D.C. Circuits – the only two circuits yet to address the issue – agree that a government may apply content-neutral regulations against sales, even of allegedly expressive merchandise, in portions of a city's

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governed by the Ninth Circuit. *See One World One Family Now v. Nevada*, 860 F. Supp. 1457 (D. Nev. 1994); *ISKCON v. San Diego Unified Port Dist.*, No. 91-1768-B(LSP) (S.D. Cal. Dec. 10, 1992). Nor do they "conflict with" the decision below on the merits, for they each involved issues of standardless discretion wholly absent from the flat ban at issue in this case. See Pet. App. 6. The same is true of *One World One Family Now v. City of Key West*, 852 F. Supp. 1005 (S.D.Fla. 1994); *see id.* at 1010.

public spaces in order to protect important public interests.

CONCLUSION

For these reasons, Respondents respectfully urge the Court to deny the writ of certiorari sought by petitioners in this case.

Respectfully submitted,

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APPENDIX

[Following are four photographic exhibits that were included by the court of appeals below in an Appendix to its decision, *see One World One Family Now v. City and County of Honolulu*, 76 F. 3d 1009, 1016-1019 (9th Cir. 1996), but deliberately omitted by petitioners from the Appendix to the Petition, see Pet. App. 16.]

$5 each
or
5 for $20